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No. 05-380

IN THE
SUPREME COURT OF THE UNITED STATES

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Petitioner,

— v. —

LEROY CARHART, M.D., WILLIAM G. FITZHUGH, M.D., WILLIAM H. KNORR, M.D., and JILL L. VIBHAKAR, M.D., on behalf of themselves and the patients they serve,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

Whether this Court should overrule its decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), even though the evidence in this case more strongly establishes than it did in *Stenberg* that the Act will significantly endanger women's health.

Whether this Court is required to defer to Congress's definition of the scope of constitutional rights and accept its unreasonable determination that the Act does not endanger women's health notwithstanding substantial medical authority to the contrary.

Whether the Act imposes an undue burden on women by allowing prosecutions of physicians who provide non-intact D&E procedures, the most common procedures used in the second trimester of pregnancy.

Whether the Act is void for vagueness because physicians performing D&E procedures, the most common second trimester abortion procedure, cannot be reasonably certain that their conduct is beyond the Act's reach, nor assured that the Act will not be arbitrarily enforced.

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COUNTERSTATEMENT

Just six years ago, this Court issued its decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), striking down Nebraska's ban on what it termed "partial birth abortions," seemingly ending the legal debate on the constitutionality of such statutes. The Court held that the law was unconstitutional because it threatened women's health and was overbroad, including within its scope the most common second trimester abortion procedure, dilation and evacuation (D&E). Three years later, dissatisfied with this Court's decision, Congress enacted its own ban, the Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 ("the Act") (to be codified at 18 U.S.C. § 1531), the law challenged here.

Rather than enacting a law that conformed to *Stenberg*, Congress sought to overturn that ruling and made findings in the Act that criticized factual findings of numerous federal district courts. The Act's chief Senate sponsor, Senator Santorum, directing his comments to this Court, stated: "I hope the Justices read this record because I am talking to you. . . . [T]here is no reason for a health exception." 149 Cong. Rec. S3456, S3486 (daily ed. Mar. 11, 2003). In the Act, Congress attacks the district court findings in *Stenberg* as "questionable" and based on a "dearth of evidence," claims that this Court was "required to accept" those findings, and then demands that this Court now defer to Congress's contrary findings, namely, that "partial-birth abortion is never necessary to preserve the health of a woman" and actually "poses significant health risks." *See* Act §§ 2(5)-(7), Petr.'s Br. App. 2a-3a.[1] Although Congress altered the definition of "partial-birth abortion" from the one

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[1] The Brief for the Petitioner is cited herein as "Petr.'s Br." The Joint Appendix is cited as "JA," the Appendix to the Petition for Certiorari is cited as "PA," and the Appendix to Respondents' Brief in Opposition to Certiorari is cited as "RA." Respondents' Court of Appeals Appendix is cited as "Resp. C.A. App" and that of Petitioner as "Pet. C.A. App."

in the Nebraska law, it failed to make clear that non-intact D&E procedures were excluded from the scope of the ban. *Cf. Stenberg*, 530 U.S. at 939 (noting that the language of the Nebraska ban "does not track the medical differences between D&E and D&X – though it would have been a simple matter" to provide an exception for D&Es). In fact, the Government now unapologetically admits that the Act will indeed ban some non-intact D&Es.

The district court held a two-week trial and heard testimony from 23 physicians, 19 of whom, including the witness for the American College of Obstetricians and Gynecologists ("ACOG"), testified concerning the relative safety of the banned procedures. PA 123a. The court also received deposition testimony of two additional medical organizations and the Department of Justice, and reviewed the entire congressional record dating from 1995. That evidence, from numerous, highly credentialed physicians practicing in hospitals, academic institutions, and clinics, establishes that intact D&E is a commonly performed and safe procedure. Moreover, the evidence shows that without a health exception, the Act would significantly undermine the safety of second-trimester abortion services. In particular, it demonstrates that the Act would materially increase the risk of sterilization, infection, and other serious health consequences. The evidentiary support for these facts is stronger than the evidence this Court found adequate in *Stenberg* to invalidate the Nebraska statute.

Ultimately, the district court issued a comprehensive 474 page opinion, providing an exhaustive summary of both the evidence before Congress and that presented at trial, and concluding, like the other two trial courts to consider the issue, that the congressional findings were not reasonable. PA 463a; *see also Nat'l Abortion Fed'n v. Ashcroft* ("*NAF*"), 330 F. Supp. 2d 436, 487 (S.D.N.Y. 2004), *aff'd sub nom. Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278 (2d Cir. 2006); *Planned Parenthood Fed'n of Am. v. Ashcroft* ("*PPFA*"), 320 F.

Supp. 2d 957, 1013-14 (N.D. Cal. 2004), *aff'd sub nom. Planned Parenthood Fed'n of Am. v. Gonzales*, 435 F.3d 1163 (9th Cir.), *cert. granted*, 126 S. Ct. 2901 (June 19, 2006) (No. 05-1382). The court also found that "the overwhelming weight of the trial evidence proves" that the procedures banned by the Act are both "safe and medically necessary in order to preserve the health of women." PA 479a.

Rather than challenging the district court findings as clearly erroneous, the Government relies exclusively on Congress's assertion of supremacy, claiming that this Court must defer to Congress's findings, even where Congress seeks to define the scope of constitutional rights and overturn this Court's precedent. There is no principled limit to this argument; it must be rejected.

I. The Evidence Establishes the Significant Safety Advantages of Intact D&E.

A. The Congressional Record

Reviewing the congressional record alone, the district court found that "a significant body of medical opinion" contradicts the congressional finding that the procedures banned by the Act are never medically necessary and that "[n]o reasonable person" could conclude otherwise. PA 501a. The court found that the congressional record disproves Congress's finding that a "medical consensus" exists that "the practice of performing a partial-birth abortion . . . is never medically necessary." PA 461a-63a. Summarizing the congressional record, the district court found that 10 of 11 doctors with recent surgical abortion experience opposed the ban. PA 464a. The court found significant that ACOG, "the nation's leading medical association concerned with obstetrics and gynecology," opposed the ban. PA 463a.

Specifically, the court found that the information presented to Congress by physicians who provide surgical abortions, including intact D&Es, showed that the intact

D&E procedures provide overall safety benefits for women undergoing second trimester abortions. *See, e.g.*, PA 83a-84a (Dr. Warren Hern: "possible advantages" to the procedure are reduced risk of perforation of the uterus and elimination of the risk of cerebral embolism); PA 90a (Dr. William Rashbaum: the intact D&E procedure does not require the use of instruments that pose a risk during D&E procedures).

Numerous other physicians expressed concerns to Congress that the Act would prevent physicians from using the safest procedures. *See* PA 69a (Dr. Courtland Robinson: "sometimes it is necessary to deliver the fetus intact to perform the safest method of abortion"); PA 78a (Dr. Dru Carlson: compared to other methods, intact D&E involves "passive dilation" that helps preserve future fertility); PA 84a-85a (Dr. James Schreiber: in some circumstances "this technique of abortion can be [the] safest"); PA 88a (Dr. Samuel Edwin: "[t]he D&X procedure is the safest option for many women faced with medical emergencies"); PA 107a (Drs. Natalie Roche and Gerson Weiss: intact D&E is sometimes the "preferred method" because it reduces chance of uterine perforations, tears, and cervical lacerations); PA 118a-20a (Dr. Vanessa Cullins: intact D&E involves "less risk of uterine perforation or cervical laceration," reduces the risk of retained fetal tissue, and requires less operating time).

Physicians also provided Congress with examples of specific circumstances when intact D&E offered particular advantages. Dr. Antonio Scommegna described a situation in which intact removal was necessary for a woman who presented in premature labor with a high fever and infection. The alternative, a "'Cesarean Section for a non-viable fetus.' . . . would have 'increased significantly' the risk of 'spreading infection, affecting her future fertility . . . .'" PA 86a-87a. Dr. David Grimes described a case in which a patient suffered from severe preeclampsia, in "'a dangerous and extreme form' . . . involving liver failure and an

abnormal blood-clotting ability," where "an intact D&E was the fastest and safest option available . . . ." PA 99a-100a. Dr. Cullins testified that intact D&E "'may be especially useful in the presence of fetal abnormalities, such as hydrocephalus'" because reduction of fetal skull reduces the risk cervical injury. PA 119a-20a.

In response to a senator's request for "specific examples" of when intact D&Es are necessary "to preserve the physical health of a woman," PA 465a-66a, Dr. Philip Darney, Chief of Obstetrics, Gynecology and Reproductive Sciences at San Francisco General Hospital, PA 110a-11a, described cases of placenta previa with a clotting disorder, and placenta accreta, where intact D&E was used to avert the risk of dangerous hemorrhaging and hysterectomy. In both cases, Dr. Darney believed that "the 'intact D&E' technique was critical to providing optimal care." PA 111a-13a.[2]

B. The Trial Evidence

The district court found that "the overwhelming weight of the trial evidence proves that the banned procedure is safe and medically necessary in order to preserve the health of women under certain circumstances." PA 479a; *see also* PA 480a-82a, 497a-501a. Intact D&E both reduces the risks of the most serious complications that result from second trimester surgical abortions and offers particular safety advantages for women with certain medical conditions. The trial record fully supports this finding.

Three physicians testified before the district court in *Stenberg* in support of intact D&E procedures. *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1116 (D. Neb. 1998), *aff'd*, 192 F.3d 1142 (8th Cir. 1999), *aff'd* 530 U.S. 914 (2000). In this

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[2] In addition, the American Medical Women's Association and the American Public Health Association also opposed the Act. PA 439a-44a. Taken together, this evidence contradicts the congressional finding that there is a medical consensus that intact D&Es should be prohibited. *See* Act § 2(1), Petr.'s Br. App. 1a.

case, 12 physicians testified, based on their extensive experience performing abortions, both that they performed D&E procedures banned by the Act and that intact D&E procedures offer meaningful safety advantages to women. *See* PA 47a, 123a, 132a, 145a, 149a-50a, 155a-60a, 166a, 169a-72a, 174a, 179a, 182a, 189a, 193a, 195a-96a, 472a-76a, 497a-99a. The witness for ACOG agreed.[3] *See, e.g.*, PA 434a-35a. The physicians identified four safety benefits of the intact D&E procedure. *See generally* PA 279a-88a.

As the district court found, one of these safety advantages is that "the intact procedure reduces the need for placing forceps into the uterus thus reducing the risk of trauma to the uterus and cervix." PA 480a-81a, 497a; *see also, e.g.*, PA 265a-66a, 280a, 285a-86a, 358a-59a; RA 81-87 (uterine perforation may result in "catastrophic hemorrhage" requiring hysterectomy). A second safety advantage is that "the intact procedure reduces the possibility of retaining fetal parts or fluids in the uterus," which can "cause death or serious illness." PA 481a, 497a; *see also, e.g.*, PA 281a-82a, 284a-85a, 400-01a, 473a-74a. The third advantage is that intact removal "reduces the possibility of exposing maternal tissues to sharp bony fragments stemming from the dismemberment of the fetus." PA 481a, 497a-98a; *see also, e.g.*, PA 265a, 277a, 279a-80a, 287a-88a, 473a-74a. Fourth, "the intact procedure is faster than the standard D&E, thus reducing . . . . the risk of hemorrhage, and the risk of complications from anesthesia." PA 481a, 498a; *see also, e.g.*, PA 279a, 282a-83a, 285a.

The testimony established that these benefits are particularly important to preserve the health of pregnant

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[3] Of the six government witnesses on the subject of safety, one testified that the safety of the procedure had been sufficiently shown such that he would not want the procedure banned at his institution; another testified that there was no medical consensus supporting the ban; and a third admitted that the banned procedures were within the standard of care. PA 475a.

women in "special cases." Dr. Westhoff, a professor of obstetrics and gynecology at Columbia University, testified that patients with serious underlying medical conditions gain the greatest benefit from intact D&E because it reduces the likelihood of complications that would be unusually risky, even catastrophic, to these women. JA 899; PA 187a, 287a. Specifically, physicians testified at trial that intact D&Es are the safest procedures for patients with liver disease and infections, including chorioamnionitis (infection of the amniotic membranes) and sepsis (a severe systemic infection), which can interfere with blood clotting and heighten the risk of maternal hemorrhage. In these circumstances, intact D&E is the optimal method "because it decreases the risk of cervical laceration and hemorrhage and shortens the procedure time for a patient facing potential multiorgan failure." PA 288a-91a; JA 711-13. As Dr. Hammond from Northwestern University explained, patients with chorioamnioitis have a higher risk of uterine perforation "because [the] uterine wall is not healthy and does not have its usual rigidity; more importantly, manipulating the interior of an infected uterus with multiple instrument passes" may seed infection from the uterine lining into the bloodstream causing sepsis. PA 289a; JA 770-71.

Dr. Hammond further testified that the banned procedures are markedly safer for women with various bleeding or clotting disorders, including those arising from toxemia or HELLP syndrome, and for those with heart problems, because in those cases it is particularly important to limit the procedure time and to reduce the risk of hemorrhage. JA 768-74; PA 290a-91a. Further, Dr. Cain, representing ACOG, testified that the intact D&E procedure is "much safer" for certain women with "triploidy" or "cancer of the placenta" where "instrumentation on the uterine wall should be avoided as much as possible." PA 434a-35a; *see also* PA 481a.

Dr. Broekhuizen described a patient with scleroderma, pulmonary hypertension, and vascular disease for whom he believed intact D&E would be safest because the procedure had to be as "short as possible with the least amount of medication." PX 120, 537-38;[4] *see also* PA 448a. Intact D&E also has safety advantages and may allow women to avoid abdominal surgery where the fetus has certain anomalies, such as hydrocephaly. PX 120, 540-42 (Broekhuizen) (describing cases where labor was induced knowing fetal head would lodge at the cervix and would need to be decompressed). *See also* PX 121, 1600-01 (Chasen) (discussing case of hydrocephaly).

Even the Government's expert, Dr. Charles Lockwood, Chair of the Department of Obstetrics & Gynecology at Yale University, acknowledged that intact D&E might be the safest procedure in some circumstances. For example, for a woman with chorioamnionitis or placenta previa (a condition in which the placenta covers the cervical opening and can cause bleeding and hemorrhage) who also had a viral infection such as HIV or hepatitis, Dr. Lockwood conceded that intact D&E may be the best alternative, and that safe alternatives are not always available. JA 474; *see also* JA 424-25, 433.[5] He also acknowledged that he supervised physicians performing intact D&Es and plans to allow intact procedures to be performed at the Yale University School of Medicine. PA 217a, 219a, 471a-72a.

On the issue of whether "a substantial body of medical opinion" supports the proposition that the intact D&E procedure is the safest for some women, the district court

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[4] Plaintiffs' and Defendant's trial exhibits are cited as "PX" and "DX" respectively.

[5] The Government's witnesses acknowledged that safe alternatives to intact D&E do not always exist because induction is relatively contraindicated for some patients and that causing fetal demise through injection may not be safe for all women. JA 280-81, 418-19, 466, 545-47; PA 325a-88a, 502a-03a; Resp. C.A. App. 394-400.

summarized the evidence at length, describing the credentials and experience of the doctors who provided trial testimony: altogether eight board-certified obstetrician/gynecologists who practice at major metropolitan teaching hospitals and three physicians who practice at clinics. PA 498a-99a.[6] In addition, Government experts Dr. Lockwood and Dr. Bowes agreed that there is a body of medical opinion, which consists of a responsible group of physicians, who believe that D&Es in which the fetus is extracted intact or relatively intact may be the safest procedure for some women in some circumstances. PA 394a, 470a.

In holding that evidence proves that the banned procedures are needed and sometimes safer than other procedures, the court noted that to hold otherwise, it "would have to find that the numerous and extraordinarily accomplished surgeons who gave testimony in this case and who routinely use the banned technique throughout this country, many at major metropolitan hospitals, do not know what they are doing." PA 495a.

Moreover, the district court, unlike Congress, had the benefit of a peer-reviewed study reporting on the intact D&E procedure. JA 479-94; PX 27 (Stephen T. Chasen, et al., Dilation and Evacuation at >20 Weeks: Comparison of Operative Techniques, 190 Am. J. Obstet. & Gyencol. 1180 (2004)). The study, a retrospective chart review, supports the expert testimony that intact procedures offer significant safety advantages.[7]

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[6] This summary makes clear that "Congress was incorrect in finding that the intact D&E is not taught at medical teaching institutions." PA 421a; *see also* PA 471a-74a (naming prestigious medical schools and hospitals where intact D&E is taught); JA 137, 402, 459-60, 570, 728-29, 743-44, 788-89, 872.

[7] As explained by Joel Howell, M.D., professor and medical historian at the University of Michigan Medical School, with a specialty in the history of surgical technique development, intact D&Es have developed and been studied in accordance with accepted medical practice. JA 163-65.

The study compared the complication rates of women undergoing non-intact D&Es at a median gestational age of 21 weeks with the complications rates of women undergoing intact D&Es at a median gestational age of 23 weeks. JA 469, 608-09. Although the intact procedures were performed at later gestational ages and thus, as Government witness Dr. Lockwood agreed, would be expected to have higher complication rates, the study found that the complication rates were similar, as were the outcomes of subsequent pregnancies. PA 357a-59a, 490a-91a; RA 103-04; *see also* JA 469-70, 484-86, 608-09; RA 99. The fact that the later D&Es with intact extraction were of equal safety to the earlier D&Es with disarticulation suggests that the D&Es with intact extraction are safer. JA 487, 489; RA 64-67, 103-04. Moreover, as the trial court recognized, the most serious complications occurring in the procedures studied - amniotic fluid embolus, disseminated intravascular coagulation ("DIC"), uterine perforation, sepsis, and pulmonary embolus, those which required admission to the surgical intensive care unit - all occurred with dismemberment D&E, and not with intact D&Es, supporting the testimony that intact procedures reduce the risks of the most serious complications of D&E, thus offering significant safety benefits. JA 485, PA 358a.

Finally, after concluding that "the congressional record disproves the Congressional Findings" that the banned procedures "'pose[] serious risks'" to women's health, PA 464a (quoting Act § 2(14)(A), Petr.'s Br. App. 6a), a finding the Government does not contest, the court examined the trial evidence, including the admissions of defendants' witnesses, and the Chasen study, *supra* at 9-10. PA 277a-88a, 480a, 482a-94a. The district court found that "it borders on ludicrous to assert that the banned procedure is dangerous." PA 486a; *see also* JA 444-46, 464-65; PA 485a (Dr. Lockwood "agreed that 'after 20 weeks, D&E, *intact* D&Es and medical induction abortions are at least comparable.'"); PA 415a, 492a-93a (Government witness Dr. Clark disagreed that

"partial birth abortion" increases a woman's risks identified by Congress (*i.e.*, uterine rupture, abruption, amniotic fluid embolus, uterine trauma, hemorrhaging, and shock) and "said that any suggestion that the intact D&E is less safe than a standard D&E . . . has 'no place in a scientific discussion'"); PA 388a, 493a (Dr. Bowes disagreed that intact D&E poses serious risks to the long-term health of women); Resp. C.A. App. 403 (Dr. Cook testified that intact D&E "may be a preferable procedure at the same gestational age than a D&E, if you are able to have less need for instrumentation inside the uterus"); PA 386a-87a; RA 13-14, 15-19 (Government experts conceded that any concerns about pre-term birth following intact D&E are hypothetical and unproven).

II. The Act Would Prevent Physicians From Performing Non-Intact as Well as Intact D&Es.

During the second trimester the options for abortion are primarily D&E and induction. PA 269a-70a, 283a, 314a-15a, 333a, 482a-83a. D&Es are overwhelmingly preferred, accounting for 95% of abortions performed between 16 and 20 weeks and 85% of abortions performed after 20 weeks.[8] PA 183a, 194a, 323a-24a, 483a, 507a-08a. Intact D&E is a variant of the D&E procedure. PA 480a.

D&Es are performed from the beginning of the second trimester, approximately 12 to 14 weeks as measured from the first day of the woman's last menstrual period ("LMP"), and require more dilation than first trimester abortions.[9]

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[8] Inductions are not recommended before 16 to 18 weeks. PX 123, 1169-70; DX 891, 2405-06. In this method, labor-like contractions are induced with medication, which eventually cause the expulsion of the fetus. JA 829. Inductions are often not available to patients seeking elective abortions because they are generally performed in hospitals. Tr. 520; Resp. C.A. App. 519-20.

[9] The Plaintiffs in this case all perform D&Es prior to viability, which occurs starting at approximately 24 weeks of pregnancy LMP. PX 125, 14-15; Tr. 1679. For example, Dr. Carhart testified that he does not perform

Thus, when performing a D&E procedure, a physician first will dilate and soften the cervix so that the fetus and placenta can be safely removed. JA 257. In general, physicians believe that the more dilation, the safer the D&E. *See, e.g.*, JA 45-47, 130-31, 839. They therefore attempt to achieve as much dilation as possible - balancing the increased safety of greater dilation with most patients' desire to have the procedure completed expeditiously and with a minimum of cervical manipulation. JA 130-31, 630, 840; Tr. 334-35; PX 122, 786-87.

Unlike surgical abortions performed earlier in pregnancy, which generally require only the use of a suction instrument, D&E procedures require the use of additional instruments, such as forceps, to remove the fetal tissue. *Stenberg*, 530 U.S. at 924-25. Commonly during a D&E procedure the fetus is removed in pieces. This disarticulation generally "occurs between the traction of [the] instrument and the counter-traction of the internal os of the cervix." *Stenberg*, 530 U.S. at 925 (quotation omitted). It is generally not possible to accomplish disarticulation "entirely inside the uterus." PA 134a. Even when the point of disarticulation is inside the uterus, the fetal part that is being disarticulated may be outside the uterus. JA 92, 133-34, 847; PA 164a. Depending upon the distance between the cervix and introitus, sometimes part of the fetus is already outside of the woman's body when disarticulation occurs. JA 92, 847; RA 40-41. Disarticulation outside of the uterus is less dangerous because it reduces the risk of injury from sharp fragments. JA 759-60.

The testimony established that when performing a D&E, many physicians attempt to extract the fetus so that it remains as intact as possible and so that as much of the fetus

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post-viability procedures, and that he induces fetal demise prior to performing abortions after 17 weeks. Tr. 738; PA 127a. For this reason, the district court declined to determine the constitutionality of, and therefore did not enjoin, the Act as it applies after viability. PA 451a, 540a, 542a.

as possible is delivered with each pass of the instruments. JA 132-34, 739-40; PA 125a, 127a, 131a, 153a, 161a, 277a-78a, 404a. This is done in order to minimize the number of instrumental passes into the uterus to reduce the likelihood of trauma due to bringing sharp bony pieces through the uterus and cervix, and to reduce the risk of any retained tissue in the uterus. JA 45-46, 137-39, 225-27, 532-35, 604, 634-35, 694, 696, 757-60, 848-51, 892.

Many of the physicians who testified obtain relatively intact fetuses in a notable percentage of their D&E procedures. *E.g.*, JA 849 (Dr. Paul 5-10%); PA 136a (Dr. Fitzhugh, 2 to 3 times per year); PA 142a (Dr. Knorr ten times per year); PA 153a (Dr. Doe 25 of 92 procedures for fetal anomalies and 10 of 280 procedures for maternal indications); PA 162a (Dr. Broekhuizen 5-10%); PA 179a (Dr. Creinin at least once per month); PA 193a (Dr. Westhoff less than half of the cases at 18 weeks or later); PA 195a-96a (Dr. Hammond 50% of procedures between 20 and 24 weeks); *see also* JA 245-46; PA 127a, 132a (Dr. Carhart, intact removal where fetus still living, up to 4-6 times per year; intact delivery up to the shoulders 25-40 times per year).

Thus, while it is common for the physician to dismember the fetus due to the traction caused by pressure at the cervix, physicians may also bring the fetus out largely intact. At that point the physician may either dismember the fetus, or, if the entire fetus but for the head has been removed, take steps to reduce the size of the skull, or take other steps in order to remove the fetus as safely as possible. JA 40-41; PA 155a, 158a-59a, 164-65a, 179a-80a, 186a-87a, 193a, 407a. If the fetus is still living, any of these actions will inevitably cause fetal demise. JA 851; PA 130a-31a, 136a-37a; Resp. C.A. App. 549.

In those circumstances where there is enough dilation to extract the fetus intact, or relatively intact, it would increase the risks of the procedure for the physician to unnecessarily place instruments in the uterus to cause disarticulation. *See,*

e.g., JA 647, 848-49; PA 163a-64a; *see also* PA 516a (physicians attempt to remove the fetus intact, but if unsuccessful, attempt to remove it in as few pieces as possible; the physician "always specifically intends to limit the number of passes into the uterus and cervix").

The trial evidence demonstrated that the Act encompasses the D&E procedures performed by Respondents and the other experts. Many of the physicians testifying at trial stated that, as part of their routine medical practice, they perform previability abortions in which completing the procedure in the safest, most medically appropriate manner will violate the Act. JA 201-02, 611-12, 643-47, 733-34, 851-58; PA 404a-07a, 412a, 417a-18a. Stated in terms of the definition of "partial-birth abortion" set forth in the Act, in performing any D&E, these physicians: "deliberately and intentionally" extract the fetus from the woman's uterus through her vagina, JA 904-06; PA 187a, 403a, 417a; at that point, the fetus may still have a detectable heartbeat or pulsating umbilical cord, JA 801-02, 903; PA 127a, 133a, 141a-42a; and the fetus may be extracted until some "part of the fetal trunk, past the navel, is outside the body of the mother."[10] JA 906-07; PA 127a, 164a-65a, 186a, 410a, 416a-17a; Pet. C.A. App. 1450; Resp. C.A. App. 246; *see also* PA 179a. They then take steps to complete the safe removal of the fetus, which can include dismemberment,

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[10] This may occur when: a) on an initial pass into the uterus with forceps, the physician disarticulates a small fetal part, which does not cause immediate demise, and then on a subsequent pass, the fetus is brought out of the cervix past the navel; b) on an initial pass with forceps, the physician brings out a fetal part – either attached to the rest of the fetus, or not – that is "part of the fetal trunk past the navel," but the extraction does not cause immediate demise; c) the physician extracts the fetus intact until the calvarium lodges at the internal cervical os; or d) the physician extracts the fetus intact until "part of the fetal trunk past the navel" is outside the woman's body, but it is not extracted so far that the calvarium lodges at the cervical os. JA 110, 234, 689-91; PA 131a-32a, 164a-65a, 179a, 222a, 400a, 410a, 412a, 416a-17a; Resp. C.A. App. 576-79.

cutting the umbilical cord or reduction of the fetal skull. JA 40-41; PA 179a-80a, 518a-19a, 521a.

SUMMARY OF ARGUMENT

The lower courts correctly struck down the Act because it imposes an unconstitutional burden on a woman's right to choose whether or not to terminate a pregnancy. On the basis of virtually the same factual record that informed this Court's decision in *Stenberg* to invalidate Nebraska's "partial-birth" abortion statute, Congress enacted a prohibition against certain second trimester, previability abortions deliberately omitting an exception to protect the health of pregnant women. Congress passed the legislation pursuant to its claimed authority to revisit questions involving fundamental rights that this Court has carefully resolved. In enacting the statute, Congress has not merely promulgated a measure that poses a significant threat to women's health. Of equal concern, Congress has issued a rebuke to this Court, challenging its pre-eminence as the branch of government whose duty it is "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

1. In *Stenberg*, this Court explained its long-standing principle – recently reiterated by a unanimous Court in *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961, 967 (2006) – that when a law regulates access to abortion, the Constitution "requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother.'" 530 U.S. at 931 (citation omitted). In attacking the judgment of the lower court, the Government launches an ill-conceived three-front assault on *Stenberg*.

a. The Government first incorrectly asserts that *Stenberg* permits the demonstration of a significant risk to women's health on the basis of unsupported opinion. Accordingly, it urges this Court, in effect, to overturn *Stenberg's* holding that where "substantial medical authority supports the

proposition that [a statute] banning a particular abortion procedure could endanger women's health" the statute must include an exception to protect women's health. 530 U.S. at 938. The Government's warning that the *Stenberg* standard inadequately defends against the insubstantial views of isolated practitioners is a false alarm. The evidence before the lower courts in this case, including the evidence before Congress and years of additional experience and research since *Stenberg*, weighs heavily in favor of a finding that the absence of a health exception will imperil women's health.

b. In apparent recognition that the assessment of the evidence in light of the *Stenberg* standard would require the invalidation of the Act, the Government next insists that the courts must unquestioningly accept Congress's evaluation of the constitutional interests at stake. Invoking the doctrine explained by the Court in *Turner Broadcasting System v.* FCC, 520 U.S. 180 (1997), it contends that the judiciary should defer to congressional findings about what the Constitution requires so long as it can muster substantial evidence. But, the *Turner* doctrine is applicable only in matters involving Congress's predictive judgments concerning the effect of economic regulatory schemes. This Court has never deemed it appropriate to defer to Congress's findings, either of fact or law, when they define the scope of fundamental liberty interests. Moreover, even if the *Turner* doctrine were properly invoked here, given that the record discredits the congressional findings, the Court would not find those findings reasonable, as *Turner* requires.

c. Ultimately, the Government recognizes that the Act must be struck down unless the Court overturns *Stenberg*. In urging the Court to pursue that course, the Government demonstrates an inadequate regard for the societal values held safe by the principles of *stare decisis*. The Government points to few reasons that might justify this Court's departure from such recent precedent, such as a change in the facts or an erosion of the doctrines underlying *Stenberg*.

Rather, the Government must rest on its conviction that the case was wrongly decided.

2. The Act also imposes an unconstitutional burden on a woman's choice whether to terminate a pregnancy because it criminalizes an overly broad spectrum of second trimester abortions and is vague. Congress intentionally drew the definition of "partial-birth abortion" to reach beyond intact D&E abortions and include non-intact D&E abortions. Rather than hewing to the definition of intact D&E abortions as this Court understood it, Congress opted to make subject to criminal sanction procedures common to the vast majority of second trimester abortions. In fact, rather than offering a truly limiting construction of the Act, the Government now unapologetically contends that the Constitution permits a ban on non-intact D&E procedures that, until now, were widely understood to be immune from such regulation.

ARGUMENT

I. The Act Is Unconstitutional Because It Fails to Protect Women's Health.

A. *Stenberg* Requires a Health Exception in this Case.

For over 30 years, this Court has protected the individual liberty interests of women from abortion regulations that threatened their health.[11] Under the governing standard, an abortion restriction "requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother,' for this Court has made clear that a State may promote but not endanger a woman's health when it regulates the methods of

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[11] *See Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 967 (2006) (citing *Casey*, 505 U.S. at 879 (plurality opinion) (quoting *Roe v. Wade*, 410 U.S. 113, 164-165 (1973)); *Thornburgh v. ACOG*, 476 U.S. 747, 768-769 (1986); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 79 (1976)).

abortion." *Stenberg*, 530 U.S. at 931 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992)).

The *Stenberg* Court specifically addressed the quantum of proof required to establish that an exception is necessary. The Court rejected the notion that "absolute" proof must be established given that the danger to a woman's health would vary in different circumstances and that physicians make decisions about appropriate treatments based on "estimated comparative health risks (and health benefits) in particular cases." *Id.* at 937. The Court also rejected the idea that "unanimity of medical opinion" could be required and recognized the need to tolerate "*responsible* differences of medical opinion." *Id.* (emphasis added). On the other hand, the Court did not prohibit states from banning procedures "whenever a particular physician deems the procedure preferable," or require a state to grant physicians "'unfettered discretion.'" *Id.* at 938 (quoting *id.* at 969 (Kennedy, J., dissenting)).

Resolving these two concerns, the Court held that it was only where "*substantial medical authority* supports the proposition that banning a particular abortion procedure could endanger women's health, [that] *Casey* requires the statute to include a health exception when the procedure is 'necessary, *in appropriate medical judgment*, for the preservation of the life or health of the mother.'" *Id.* at 938 (quoting *Casey*, 505 U.S. at 879) (emphases added). The standard thus imposed *two* requirements to ensure the sufficiency of a threat to health to allow a banned procedure to be performed. First, a division of opinion no matter how unsupported does not suffice alone. Rather, there must be "substantial medical authority" supporting the use of the banned procedures and only then is a difference of opinion tolerated to guard against risk. Second, if, and only if, such authority exists in favor of the banned procedures, then an exception must exist allowing a physician to perform the banned procedures where in the physician's "appropriate

medical judgment," the procedures are "necessary" in a given case. *Id.* (quoting *Casey*, 505 U.S. at 879).

Requiring a health exception to prevent serious harm to pregnant women is not at odds with one of the central objectives of *Casey*. *Contra* Petr.'s Br. 11. Rather, in holding that an abortion procedure ban must have a health exception if "substantial medical authority supports the proposition that banning a particular procedure could endanger women's health," *Stenberg*, 530 U.S. at 938, the Court was applying *Casey*'s holding that compliance with an abortion regulation cannot "in any way pose significant threat to the life or health of a woman." 505 U.S. at 880, 978; *see also Ayotte*, 126 S. Ct. at 967.

The import of the *Stenberg* ruling is that "substantial medical authority" in support of a banned procedure cannot be established with the statements of a small number of experts alone, nor can it be overcome, as the Government attempts to do here, with the statements of a small numbers of experts who disagree. Specifically, the Court held that in this case there was sufficient evidence in the record to establish "substantial medical authority" supporting the use of intact D&E in light of the position of the ACOG, medical testimony, and consistent findings by numerous federal courts that had also "heard expert evidence." 530 U.S. at 932-33.

1. In the past six years, medical evidence has strengthened this Court's finding that banning intact D&Es endangers women's health.

The only difference between the record before this Court and the record before the Court in *Stenberg* is that there is now more extensive evidence as to the safety and the advantages of the intact D&E procedure.[12] That evidence

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[12] Much of the substance of the congressional record supporting the Act was before the *Stenberg* Court. *See* 530 U.S. at 994-96, 999-1000, 1016-17 (Thomas, J., dissenting). Four of the six congressional hearings were held

includes the extensive testimony of twelve second trimester abortion providers, some of the most prominent experts in the field, who teach and publish on the subject, perform banned procedures and who described in detail the benefits of intact D&E and its acceptance and use in academic settings. *See supra* at 5-8, 9, 11, 15. In addition, there is now published data that establishes the safety of the procedure, *supra* at 9-10, as well as testimony from ACOG, explaining several scenarios where the intact D&E procedure would be the safest.[13] PA 433a-35a. Accordingly, as the district court held, there is now a stronger basis for the conclusion that substantial medical authority supports the necessity of a health exception to the ban, even if it were interpreted to apply only to intact D&E. PA 469a-76a.[14]

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before the *Stenberg* decision. The post-*Stenberg* testimony contained no new evidence or rationale explaining why the absence of a health exception would not harm some women. *Compare* Pet. C.A. App. 578-86, 828-31, 878-91, 896-99, 936-42, *with* Pet. C.A. App. 51-54, 144-48, 161-63, 215-16, 222, 545-46.

[13] The principal dissents in *Stenberg* challenged the Court's determination that the evidence established that the ban caused sufficient risk to women's health to require an exception. *See, e.g.*, 530 U.S. at 964-67 (Kennedy, J., dissenting) (pointing to the absence of experts testifying who had themselves performed intact D&Es and to ACOG's statement that it "could identify no circumstances under which [D&X] would be the only option to . . . preserve the health of the woman"); *id.* at 1017 (Thomas, J., dissenting) (citing the majority's "significant body of medical opinion" articulation of the legal standard, but arguing that it was not met on the particular facts in *Stenberg*). Additional evidence now clarifies ACOG's statement, and numerous experts testified at trial who perform intact D&Es. *Supra* at 5-11.

[14] The Government is wrong when it claims that to prevail Respondents must also "demonstrate that the statute would create significant health risks for at least a 'large fraction' of women covered by the statute." Petr.'s Br. 19 (footnote omitted). As *Ayotte* makes clear, the determination of (a) whether an abortion regulation violates the Constitution for failing to adequately protect women's health, and (b) the appropriate remedy for such violations, are distinct inquiries. Consideration of whether a constitutional violation impacts a "large fraction" of women is only relevant to the second inquiry, that of appropriate remedy; the Court does

2. The Government seeks to overturn the substantial medical authority test.

The Government seizes on the "division of opinion" language in *Stenberg* to suggest that *Stenberg* stands for the proposition that a lone expert, making bald assertions with no support, would be enough to establish a risk to women's health sufficient to require a health exception. *See* Petr.'s Br. 17 ("*Stenberg* therefore did not establish a rule that a plaintiff need only identify a division of opinion among medical experts on the existence of significant health risks."). But in doing so, the Government attacks a straw man.

As shown above, neither the Court in *Stenberg* nor Respondents take the position that "substantial medical authority" is so easily established.[15] In fact, the record developed at trial responds to the concerns expressed by the dissenting opinions in *Stenberg* concerning the sufficiency of the evidence. The record establishes that many prominent board-certified obstetrician/gynecologists who provide abortions believe that the intact D&E is sometimes the safest procedure to reduce the risk of the worst complications associated with D&E. These experts testified that intact D&E is also the best procedure to reduce the risks to particularly sick women, such as those with chorioamnionitis, placenta previa, placenta accreta, liver disease, scleroderma, uterine or placental cancer, hydrocephaly, bleeding disorders or heart disease. *See supra* at 5-8.

The record also provides testimony from ACOG stating that its task force charged with issuing a policy statement on intact dilation and extraction considered at least 25-30

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not consider whether an exception for women's health will affect a "'large fraction'" of women when determining whether that omission violates the Constitution. *Ayotte*, 126 S. Ct. at 967 (quoting *Casey*, 505 U.S. at 879) (other citations and quotations omitted).

[15] Ironically, it is the Government that claims that the opinions of a small number of physicians should override the vast amount of the evidence, from both experts in the field and ACOG.

different circumstances in which intact D&X would be the safest option. PA 435a; PX 115, 177, 201, 210, 229. As a result, the task force issued a statement that intact D&E "may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient based upon the woman's particular circumstances can make this decision." JA 976. Thus, despite the fact that the task force did not identify a circumstance where intact D&E was the *only* available option to save the life of the woman or preserve her health, Petr.'s Br. 34, it relied on actual scenarios to reach its conclusion that it may be the safest and best for some woman in some circumstances.

After attacking "substantial medical authority" as an overly lenient standard, the Government then offers a new interpretation of *Stenberg*. It proposes that *Stenberg* should be read as requiring that "a plaintiff challenging an abortion regulation that lacks a health exception must actually prove" that the regulation at issue would endanger women's health. Petr.'s Br. 18. Respondents answer is that this is true,[16] but that the question is again one of the sufficiency of proof. In other words, what level of "medical authority" is "substantial," and proves that the ban creates health risks for women?

The problem the Government faces is that the more extensive record in this case constitutes substantial medical authority by any reasonable measure. *See supra* at 2-11. In

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[16] Petitioner makes much of its claim that *Stenberg* requires plaintiffs to establish that the ban would "create *significant* health risks." Petr.'s Br. 40 (quoting *Stenberg*, 530 U.S. at 932) (emphasis added by Petitioner). In this case, though, the Respondents have proven that banning the previability intact D&E procedures at issue in this case would in fact create *significant* health risks, by increasing risks of serious complications, such as hemorrhage, infection and sepsis, uterine and bowel perforation, hysterectomy, and cervical laceration and by preventing women with particular medical conditions from undergoing the safest procedure for them. *Supra* at 5-11.

fact, as the district court found, a finding the Government has not claimed was clearly erroneous, "the overwhelming weight of the trial evidence proves" that the procedures banned by the Act are both "safe and medically necessary in order to preserve the health of women." PA 479a.

B. This Court Should Not Defer to Congress's Unreasonable Findings That Restrict a Fundamental Right.

As a result of the strength of the evidence, the Government then argues that this Court should not consider the entire record but should "defer" to Congress's findings that seek to define the scope of the rights at issue here. This is but another attempt to alter the *Stenberg* test by asserting that the proper question is not, as the Eighth Circuit held, "whether 'substantial medical authority' supports the need for a health exception so as to guard against the denial of another constitutional right." PA 15a; [17] but rather "whether substantial evidence supported Congress's finding that 'partial-birth abortion is never medically indicated to preserve the health of the mother.'" Petr.'s Br. 30 (citations omitted). While the first test examines where there is adequate proof of danger to women's health, the latter asks only whether there is some testimony in the record that would support Congress' conclusions about the scope of a constitutional right. This Court must reject the

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[17] It is not true that the Eighth Circuit's conclusion that the key facts are legislative facts "foreclosed Congress from making findings." Petr.'s Br. 27. Congress remains free to make new findings and may overcome *Stenberg*'s conclusion regarding "substantial medical authority" based on "new evidence." PA 19a-20a. Nonetheless, the findings must be freely reviewable by the courts to prevent Congress from simply overriding the judicial function. Such independent review is also necessary to insure nationally uniform constitutional standards. PA 16a-17a ("Only treating the matter as one of legislative fact produces the nationally uniform approach that *Stenberg* demands.") (quoting *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2000)).

Government's invitation to allow Congress to rewrite the scope of rights.

In support of its position, the Government relies in the main on *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994) ("*Turner I*") and *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"). There, this Court held that courts must accord substantial deference to the "predictive judgments" of Congress. *See* 512 U.S. at 665 (citation omitted). The courts' sole obligation in those circumstances is to "assure that . . . Congress has drawn reasonable inferences based on substantial evidence." *Id.* at 666. The Court noted that deference is appropriate where Congress is "amassing and evaluating the vast amounts of data bearing upon" legislative questions, *id.*, and has special significance in cases, like *Turner*, "involving congressional judgments concerning regulatory schemes of inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change." *Turner II*, 520 U.S. at 196; *see also id.* (noting that deference is necessary so as not to infringe on legislative authority to make "predictive judgments when enacting nationwide regulatory policy").

But the *Turner* cases do not support application of "deference" to this case. First, as *Turner* recognized, the Court has never deferred to congressional or state legislative findings in a case like this one where Congress uses its findings in an attempt to alter the meaning and scope of substantive constitutional rights. Extension of *Turner* deference to this case would effectively provide Congress with carte blanche to violate the Constitution simply by making carefully chosen "findings."

Second, the Government seeks to extend *Turner*'s deference regarding findings that predict the impact of certain economic regulatory schemes to findings about the current state of medicine. The physiology involved in medical and surgical practice is unlike those areas where

Congress has particular expertise and in which the courts have deferred, such as in economic regulatory schemes or campaign finance laws.

Moreover, even if application of *Turner* deference *were* appropriate in this case, the Government incorrectly formulates *Turner* deference itself by omitting the inquiry into whether the conclusions drawn by Congress were "reasonable." If adopted, this analysis would require this Court to simply adopt the findings and ignore the vast contradictory record evidence, resulting in virtual "blind" deference to the congressional findings.

Finally, reviewed under the proper *Turner* standard, the congressional findings must be rejected. As the district court's exhaustive review of the entire congressional and trial records establishes, the congressional findings are not "reasonable" in any sense of the word.

1. **This Court must Exercise Independent Judicial Review of the Entire Record, Not Blindly Defer to Congressional Findings.**

Perhaps because of the strength of the record in this case, the Government does not even attempt to meaningfully address the evidence relevant to the existence of "substantial medical authority" or that would otherwise establish the significant health risks that the ban would impose on women. Instead, the Government argues that this Court should "defer" to Congress's findings even though those findings are supported by nothing more than the unsupported statements of a few physicians. *See* Petr.'s Br. 31-37.

a. ***Turner* is inapplicable where Congress's "fact-finding" establishes the scope of a fundamental right.**

Of course, the judiciary must show respect for its coequal branches and should not "ignore or undervalue" the judgments of Congress. *See Turner II*, 520 U.S. at 224

(quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973) ("*CBS*")). By the same token, the legislative branch has a responsibility to avoid "encroachment or aggrandizement" at the expense of the other branches, the very concern that has "animated [the Court's] separation-of-powers jurisprudence and aroused [its] vigilance against the hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power." *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (citations omitted). When the legislative branch overreaches, this Court has a duty to preserve its own status as a coequal branch, a duty to "say what the law is," *Marbury*, 5 U.S. (1 Cranch) at 177, and, as is relevant in this case, a duty to protect each individual's fundamental liberty interests.

As a result, this Court has never "defer[ed] to the judgment of the Congress . . . on a constitutional question" as the Government here demands, *see CBS*, 412 U.S. at 103, and has declined again and again to defer to findings in cases like this one. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (declining to expand *Turner*'s reach in a case involving congressional findings that supported a content-based regulation of speech); *United States v. Morrison*, 529 U.S. 598, 614 (2000) (striking down civil remedies provision of Violence Against Women Act despite "numerous [congressional] findings regarding the serious impact [of] gender-motivated violence"); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (rejecting Congress's attempt to legislatively supersede holding in *Employment Div. v. Smith*, 494 U.S. 872 (1990)); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when [constitutional] rights are at stake."); *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring) ("[W]here a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity.").

Stressing this point recently in a campaign finance case, a context in which deference is often appropriate,[18] this Court declined again to defer to findings, holding that if the "constitutional risks" are too great, there is "no alternative to the exercise of independent judicial judgment." *Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006) (citing *McConnell v. FEC*, 540 U.S. 93, 137 (2003)). As the Court noted, "where there is strong indication in a particular case, *i.e.*, danger signs, that such risks exist . . ., courts, including appellate courts, must review the record independently and carefully." *Id.*

The Government's attempt to distinguish this long line of cases falls flat. For example, the Court in *Ashcroft* "did not reject a request for deference on the ground that the congressional finding was legally irrelevant." *Contra* Petr.'s Br. 26 n.7. Rather, in that case the Court rejected congressional findings that virtual images of child pornography would increase pedophilia because that "hypothesis" was "implausible," even though the findings were relevant to the state's interest in protecting children from harm from virtual pornography. *Compare* 535 U.S. at 254, *with id.* at 267-68 (Rehnquist, C.J., dissenting) (arguing that the majority should have deferred to predictive finding).

Nor did the Court in *Sable Communications of California, Inc. v.* FCC, 492 U.S. 115 (1989), reject deference to Congress's conclusion about an issue of constitutional law solely on the ground that there was no relevant legislative finding. Petr.'s Br. 26 n.7. Rather, this Court was clear that *even when there are relevant findings*, it would not yield its "task in the end to decide whether Congress has violated the Constitution" in any case. *Sable*, 492 U.S. at 129 (noting that "*[b]eyond the fact* that whatever deference is due legislative

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[18] *See Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006) (noting that deference to legislature in matters related to running for office is "ordinarily" appropriate because legislators have "particular expertise" in such matters) (citation omitted).

findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law," there was no legislative finding that would justify the government's position) (emphasis added).

Finally, that *Landmark* involved state legislative findings does not undermine its relevance here. *Contra* Petr.'s Br. at 25-26 n.7. As *Sable* and *Ashcroft* make clear, the importance of independent judicial review to protect against "legislative definition" of the scope of constitutional rights applies with equal force to federal statutes. As the Court has noted, "[a] legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of . . . whether the legislation is consonant with the Constitution." *Landmark*, 435 U.S. at 844. "Were it otherwise" the scope of rights "would be subject to legislative definition." *Id.*; *see also Reno v. ACLU*, 521 U.S. 844, 875 (1997) (reaffirming *Sable* and noting that the Court must prevent "unnecessarily great restriction" of constitutional rights). Notably, in *Randall*, the Court cited to *McConnell*'s review of a federal statute and made no distinction between the concerns raised by or the deference due to a state statute or a federal one. 126 S. Ct. at 2492 (citing *McConnell*, 540 U.S. at 137) (evaluating independently whether danger signs existed and the impact of contributions and rejecting contribution limit). *Contra* Petr.'s Br. 46 (arguing that more deference is due federal statutes than state ones).

Turner did nothing to alter this balance of powers. Although the legislation in *Turner* had an "incidental effect" on First Amendment rights, it was principally economic regulation. *Turner II*, 520 U.S. at 225 (Stevens, J., concurring). In contrast, laws like the Act that involve *direct* regulation of abortion in a way that is not "incidental," but strikes at one of the core values protected by this Court's jurisprudence – women's health – are subject to a much more exacting degree of scrutiny. As Justice Stevens explained, "factual findings accompanying economic measures that are enacted

by Congress itself and that have only incidental effects on speech merit greater deference than those supporting content-based restrictions on speech." *Turner I*, 512 U.S. at 671 n.2 (Stevens, J., concurring) (citation omitted); *see Landmark*, 435 U.S. at 843.

None of the other seven cases cited by the Government, Petr.'s Br. 22-23, are to the contrary, because they nowhere suggest that the Court give "great deference" to congressional findings where the case requires the application of heightened scrutiny to violations of fundamental substantive rights, as this case does. Rather, five of the cases did not involve any heightened constitutional scrutiny, and their deference to congressional findings or policy judgments is thus unsurprising and irrelevant. In these cases, the Court was simply examining whether Congress had articulated justification for legislation that was rationally related to its intended purposes.

In *Marshall v. United States*, 414 U.S. 417 (1974), for example, the issue was limited to whether Congress's funding decision about which drug addicts would most benefit from drug treatment was rationally related to the intended purpose of an "experimental" program. *Id.* at 426; *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330-34 (1985) (reviewing procedural due process challenge to limit on attorneys fees for veterans' benefits proceedings); *Jones v. United States*, 463 U.S. 354, 364 (1983) (holding that Congress's decision to mandate civil commitment for insanity acquittees was "reasonable"); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (examining whether legislature "acted in an arbitrary and irrational way" in setting up compensation program for victims of black-lung disease); *Lambert v. Yellowley*, 272 U.S. 581, 589, 594-95 (1926) (examining whether Congress's limits on

prescription of "spirituous liquor" for medical use was "arbitrary").[19]

In *Board of Education v. Mergens*, 496 U.S. 226 (1990), the Court did not defer to Congress's speculation that high school students are unlikely to confuse an equal access policy with state sponsorship of religion, but independently examined that claim, noting that the Court had come to the same conclusion in two other cases and referencing psychology research with similar findings. *Id.* at 250-51.

Finally, *Rostker v. Goldberg*, 453 U.S. 57 (1981), did not involve deference to Congress in a general sense; rather, the Court took pains to highlight its uniquely deferential role in reviewing congressional judgments about the military and national defense. *Id.* at 64-65, 66 (according "greater deference" in cases involving Congress's authority over military affairs and upholding male-only draft registration).[20]

Moreover, in two of the cases cited by Petitioner, this Court explicitly declined to evaluate congressional findings or to address the level of deference due such findings. In evaluating the provision in *Usery*, the Court noted that the plaintiffs challenging Congress's decision submitted "nothing new to add to the debate." 428 U.S. at 33; *see also Walters*, 473 U.S. at 330 n.12 (evaluating evidence before the

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[19] Further, even under rational basis review, it was important to the Court in *Usery* and *Lambert* that Congress's policy choices offered more rather than less protection for those affected. *See Usery*, 428 U.S. at 34 (Congress decided "to resolve doubts [about the reliability of negative X-ray evidence] in favor of the disabled miners") (internal quotation omitted); *Lambert*, 272 U.S. at 594 (noting that Congress allowed prescription of alcohol in limited quantities "in deference to the belief" of the minority view of the usefulness of spirituous liquors).

[20] For these same reasons, *Mergens*, *Walters*, and *Rostker* do not support the claim, *see* Petr.'s Br. 21, that the "Court has deferred to congressional factual findings in a wide variety of contexts and with regard to a wide variety of constitutional claims."

district court and declining to address the level of deference due to congressional findings because the findings and the district court record were "entirely consistent").

Finally, in none of the cases cited by the Government had the Supreme Court already issued a controlling opinion on an identical constitutional issue as this Court had here and in *Boerne*. Unless the Court refuses to defer to Congress's attempt to reverse *Stenberg* by making contradictory findings, Congress will take over from the Court its role as the final arbiter of the scope of constitutional rights, upsetting the balance so carefully designed by the Framers. *See, e.g., Boerne*, 521 U.S. at 529.

b. *Turner* deference is appropriate where Congress has an institutional advantage or expertise in making "predictive" judgments.

Turner deference is limited in another way. In *Turner I* and *Turner II*, this Court noted that deference is appropriate where Congress has a distinct institutional advantage in analyzing and making predictions about the *future* impact of certain economic regulations, such as the cable legislation at issue in that case. *Turner II*, 520 U.S. at 196 (noting that courts should not "infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy"). Those are circumstances in which Congress must make its best predictions concerning how an industry will evolve or how individuals will respond to economic motivations. *Turner I*, 512 U.S. at 666; *id.* at 674 (Stevens, J., concurring) (noting that deference is appropriate where questions are "not at present susceptible of reliable answers").

The Court's decision in *McConnell* illustrates this distinction. There the Court applied *Turner* deference when reviewing a congressional prediction about the impact of banning the use of soft money by national party committees. *See* 540 U.S. at 165 (citing *Turner*, 512 U.S. at 665) (finding

that Congress's prediction that donors would try to circumvent bans on soft money was based on experience with other campaign finance laws and was thus due "substantial deference"). However, the Court did not apply *Turner* deference in its review of congressional conclusions about the *current* impact of campaign finance regulation. *See id.* at 129-32 (declining to even mention *Turner*).

Rather than that *Turner* is limited to cases that involve "predictive judgments," Petitioner claims that this case involves "predictions" in the sense that Congress "predicted" the "*future* impact of the ban." The Government claims that the fact that these "predictions" were based on medical opinion about the current state of medicine makes no difference because predictions "inevitably rel[y] on data concerning the status quo." Petr.'s Br. 24. But this is no answer.

Of course, "predictions" like those in *Turner* are based on the current state of affairs and involve informed guesswork about how that state of affairs would evolve in reaction to new conditions. That is what distinguishes predictions from fortune telling. But this case does not involve "predictions" of that sort; it involves expert medical opinion about whether medical procedures currently performed are currently the safest procedures for some current patients. *Turner*, unlike this case, involved "predictions" about unknown future events in response to a regulatory scheme.

2. Even under *Turner*, Congress's findings must be rejected as unreasonable.

The Government suggests that this Court limit its review to whether Congress had "substantial evidence" before it that supported its findings. But even under *Turner*'s deferential review, the Court examines the record not just to ascertain the existence of "substantial" evidence; it also must determine whether Congress has drawn *reasonable inferences* based on the evidence. *Turner I*, 512 U.S. at 666.

Moreover, in applying deference, the reviewing court "examine[s] first the evidence before [C]ongress and then the further evidence presented to the district court . . . to supplement the congressional determination." *Turner II*, 520 U.S. at 196; *see also Turner I*, 512 U.S. at 667-68.[21] In accordance with these instructions, the district court here conducted a painstaking evaluation of the findings and evaluated them, first in light of the congressional record alone, and then in light of the trial record as well.

The district court explicitly held that the congressional findings are not reasonable based solely on the complete record before Congress. PA 461a-64a, 467a-69a. Contrary to the congressional findings, the congressional record established that: (1) there is extensive credible evidence that intact D&E is the safest procedure in some circumstances, PA 463a-68a; (2) at a minimum, there is substantial medical authority supporting the safety benefits of intact D&E, PA 461a-63a; and (3) intact D&E does not present additional risks to the woman, PA 461a-63a. *See* PA 467a ("It is unreasonable to ignore the voices of the most experienced doctors and pretend that they do not exist."); *see also PPFA*, 435 F.3d at 1176 (holding that "even under the most deferential standard of review "we cannot uphold the finding" that a consensus exists in the medical community that "prohibited procedures are never necessary to preserve the health of women"); *PPFA*, 320 F. Supp. 2d at 1013-14 (holding that even using the stringent *Turner* standard of "substantial deference," Congress's findings did not constitute reasonable inferences based on substantial evidence); *NAF*, 330 F. Supp. 2d at 487 (finding it "highly

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[21] *Turner* itself involved an independent assessment of the entire record, a determination of whether the conclusions and inferences drawn by Congress were reasonable, a remand to the district court for further development of the record to inform the court's review of the findings, and a careful weighing of the resulting record. *See, e.g., Turner II*, 520 U.S. at 204.

doubtful" that the strict *Turner* standard applies, but holding that even under *Turner*, the Act is unconstitutional because it lacks a health exception).

The district court also evaluated the findings in light of the trial record and found that:

> [T]rial evidence establishes that a large and eminent body of medical opinion believes that partial-birth abortions provide women with significant health benefits in certain circumstances, [and] that Congress was wrong, and unreasonably so, when it found that the banned procedure "poses serious risks to the . . . health of women," that there is "no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures," and that the banned procedure is "never necessary to preserve the health of a woman."

PA 476a-77a; *see also* PA 479a-501a.

The Government cites selectively to statements by the American Medical Association (AMA) and ACOG as providing "substantial evidence" in support of Congress's findings. The quoted statements, however, reflect only a sliver of the information provided to Congress by these groups. First, Congress relied on a statement issued by the AMA that was later discredited. As a result, the district court found that the "the policy views of the AMA on this subject are suspect." PA 60a n.5. Second, Congress disregarded other statements of the AMA task force set up in 1997 to study "late-term" abortion techniques that concluded: "[Intact D&E] may minimize trauma to the woman's uterus, cervix, and other vital organs." Tr. 1241; PX 13, *Partial Birth Abortion Ban Act of 2002: Hearing on H.R. 4969 Before the House Subcomm. on the Constitution of the Comm. on the Judiciary*, 107th Cong. 189-219 (July 9, 2002) (AMA Board Report).

Likewise, the Government ignores the testimony in the record that establishes that when ACOG considered "[a]t least 25 to 30 different types of cases" where intact D&E was used, it concluded that there were "individual patient circumstances where the intact D&E was a better choice for individual patients." PA 434a-35a; *see also* JA 500-02; Resp. C.A. App. 89-92.

Finally, the Government completely ignores all of the evidence at trial that does not support its position. After considering the trial evidence, however, all three district courts reached the same conclusion: that the congressional findings were not reasonable. *See* PA 461a-64a, 467a-69a, 477a; *PPFA*, 320 F. Supp. 2d at 1013-14; *NAF*, 330 F. Supp. 2d at 487.

C. This Court Should Not Overrule *Stenberg*.

All but conceding that *Stenberg* "compels the conclusion that the Act is unconstitutional," The Government blithely invites the Court to overrule *Stenberg*, acknowledging only that ordinarily adherence to precedent "help[s] ensure continuity in the law as developed by this Court." Petr.'s Br. 44. In urging a jettisoning of recent precedent so casually, the Government asks this Court to devalue the "'fundamental importance' of *stare decisis*, the basic legal principle that commands judicial respect for a court's earlier decisions and the rules of law they embody." *Randall*, 126 S. Ct. at 2489 (quotation omitted).

When, as here, the Court "is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Thus, this Court has repeatedly admonished that, "[e]ven in constitutional cases . . . we will not overrule a precedent absent a 'special justification.'" *Harris v. United States*, 536 U.S. 545, 557 (2002) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

The inquiry this Court undertakes when it considers whether established precedent should be overruled is familiar:

> [W]e may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification . . . .

Casey, 505 U.S. at 854-55 (internal citations omitted).

None of the reasons the Government advances for discarding *Stenberg* approaches the special justification necessary to depart from such recent precedent. First, and foremost, the Government claims that continued adherence would be "unfaithful to the Court's prior precedents, including *Casey*." Petr.'s Br. 44. But in support of that assertion the Government principally cites the dissenting opinions in *Stenberg*. Disagreement with the result in *Stenberg*, however, cannot alone justify the departure the Government advocates. This Court should not reexamine *Stenberg* absent "a justification beyond a present doctrinal disposition to come out differently" from the Court of six years ago, because "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." *Casey*, 505 U.S. at 864.

The Government has not made the slightest showing that the *Stenberg* ruling has proved to be "unworkable in practice" or that the law's growth in the intervening years has left *Stenberg*'s "central rule a doctrinal anachronism." *Id.* at 835. At most, it claims that adherence to *Stenberg* "would

place judges in an untenable position and would prove unworkable in practice." Petr.'s Br. 44. But the claim that a case should be overruled because it requires judges to make judgments of the sort they make every day is beyond absurd. And far from proving unworkable, *Stenberg* has led to remarkably consistent results among the district courts and courts of appeals that have reviewed the Act, all of which have found it unconstitutional.

Nor has the Government shown that "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855. Indeed, "the evidence has not changed since the Supreme Court decided *Stenberg* - only the conclusions that Congress decided to draw from that evidence." *NAF*, 437 F.3d at 292 n.9 (Walker, C.J., concurring).

The *Casey* Court warned, in like circumstances, that a judgment overruling established law would be seen to rest "upon a ground no firmer than a change in our membership [and] invite[] the popular misconception that this institution is little different from the two political branches of the Government." 505 U.S. at 864 (internal quotation marks and citations omitted). The Government has presented this Court no sound reason to depart from recent precedent and thereby risk the legitimacy so central to its charge under the Constitution.

II. By Banning D&E Procedures, the Act Impermissibly Burdens Women Seeking Second Trimester Abortions.

A law that permits prosecution of "physicians who use D&E procedures, the most commonly used method for performing previability second trimester abortions" imposes "an undue burden upon a woman's right to make an abortion decision." *Stenberg*, 530 U.S. at 945-46;[22] *id.* at 945

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[22] Although the Eighth Circuit did not reach Respondents' claims that the Act imposes an undue burden and is impermissibly vague, PA 25a, as prevailing party, Respondent may, of course, "defend its judgment on any

(emphasizing that a law is an undue burden if "[a]ll those who perform abortion procedures using [the D&E] method must fear prosecution, conviction, and imprisonment").

Despite this Court's ruling in *Stenberg*, though, the Act's definition of "partial-birth abortion" does not clearly distinguish between D&E and intact D&E procedures in a way that would allow physicians to control their actions during a D&E to prevent them from running afoul of the Act. Thus, the district court held, even after adopting a limiting construction offered by the Government, that the Act covered some D&E abortions and thus posed an undue burden.[23]

Unlike the Nebraska Attorney General, the Government here does not offer a limiting construction that would narrow the Act to intact D&Es. *Cf. Stenberg*, 530 U.S. at 925, 927 (recognizing that the distinguishing features of intact D&Es are intact extraction to the fetal head followed by reduction of the fetal skull). While it offers an arguably limiting construction as to scienter, the Government now concedes that, as the district court found, even with the limiting construction, the Act sweeps far beyond the narrowly defined intact D&E procedures described in *Stenberg* and does indeed ban some non-intact D&Es. *Compare* Petr.'s Br. 47 (asserting that procedures banned by the Act could involve "dismemberment of the fetus"), *with Stenberg*, 530 U.S. at 940-42 (rejecting the Nebraska Attorney General's argument that the ban could be limited to intact D&Es).

Thus, Petitioner's approach has necessarily changed. The Government now attempts to save the Act by both

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ground properly raised below." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

[23] *See also PPFA*, 435 F.3d at 1180-81 ("[B]ecause of both the actual and the potential risk to doctors who perform previability [non-intact] abortions, the Act imposes an 'undue burden.'") (quoting *Stenberg*, 530 U.S. at 946).

attempting to limit its reach somewhat, but also by expanding the scope of permissible bans on D&E procedures. It asserts that *Stenberg* permits a ban on D&E procedures, even those involving dismemberment, so long as the physician intends "to remove the fetus as intact as possible," and succeeds in removing the fetus to one of the anatomic landmarks specified in the Act. *See* Gov't C.A. Reply 27. Such a ruling would prevent physicians who perform "standard" non-intact D&Es from performing these procedures for fear of prosecution under the Act. Permitting such a result is inconsistent with the Court's careful distinctions in *Stenberg* between D&Es and intact D&Es and in effect permits a ban on all D&E procedures.

A. The Act Fails to Track Differences Between D&E and Intact D&E Procedures.

The language of the Act "does not track the medical differences between D&E and D&X — though it would have been a simple matter, for example, to provide an exception for the performance of D&E and other abortion procedures." *Stenberg*, 530 U.S. at 939 (citation omitted). The Act does not reflect the features recognized by this Court as distinguishing D&E from intact D&E procedures. *Compare id.* at 925 (describing common points in D&E procedures), *with id.* at 927 (describing "intact D&E" as involving the intact removal of the fetus in a single instrument pass followed by the "collapse[of] the skull"), *id.* at 928 (noting that the ACOG definition of D&X includes "breech extraction of the [fetal] body excepting the head" and "partial evacuation of the intracranial contents of a living fetus"), *and id.* at 939 (stating that during a D&X procedure "the body up to the head is drawn through the cervix"); *see also id.* at 959-60, 974-75 (Kennedy, J., dissenting) (explaining that "D&X" involves breech extraction of an intact fetus and reduction of the size of the fetal head).

For example, the Act does not require that the fetus be removed intact, that the fetus be drawn through the cervix

but for the head, or that the physician take steps to reduce the size of the fetal skull. Rather, it bans procedures in which the fetus is extracted to the navel; prohibits overt acts in addition to procedures performed to reduce the size of the skull, including disarticulation and cutting of the umbilical cord; and does not require that the fetus be intact. *Cf. Stenberg*, 530 U.S. at 939 (noting that the Nebraska statute did not "anywhere suggest that its application turns on whether a portion of the fetus' body is drawn into the vagina as part of a process to extract an intact fetus after collapsing the head as opposed to a process that would dismember the fetus").

The Government points to two features of the Act's definition that it asserts adequately distinguish the banned procedures from what it characterizes as "standard D&Es." Petr.'s Br. 45-46. First, it claims that the Act's specification of "anatomical 'landmarks'" excludes "standard D&E abortions" in which a smaller portion of the fetus, such as a foot or arm, is drawn through the cervix (or outside the mother's body altogether) and disarticulated. *Id.* at 46. As the Ninth Circuit concluded in rejecting this argument, the "anatomic landmark" language does not exclude non-intact D&Es from the Act's coverage:

> [I]ntact D&Es are not the only form of D&E in which the "entire fetal head" or "any part of the fetal trunk past the navel" of a living fetus may be delivered prior to the performance of an act banned by the statute: the "anatomic landmark" specified in the Act may be reached by doctors performing either intact or non-intact D&Es.

PPFA, 435 F.3d at 1178-79 (footnote omitted).

The Government also asserts that "[b]y requiring a discrete 'overt act,' the Act excludes standard D&E abortions in which the delivery of a portion of the fetus and the performance of the lethal act (*i.e.*, the disarticulation of the

fetus) are indistinguishable." Petr.'s Br. 46. This distinction does not effectively exclude D&E procedures, however, because, as the Government concedes, the overt act may include disarticulation. *Id.* at 47; *see PPFA*, 435 F.3d at 1179 (acknowledging that in both D&E and intact D&E procedures where the fetus has been removed to one of the anatomical landmarks, the physician may need to perform an overt act, including "disarticulating the fetus or compressing the abdomen" "in order to complete the abortion safely"); PA 515a-21a (describing how the Act applies to procedures involving disarticulation, "the hallmark of all D&E abortions").

B. The Government Admits that the Act Bans Non-Intact D&Es.

Even if the Act is construed as the Government suggests, to require "specific intent at the outset of the procedure," see *infra* at 42-43, as the Government now states affirmatively, it is not limited to intact D&E procedures. *See also* PA 515a-21a (holding that the limiting construction does not foreclose the application of the Act to certain D&E procedures and therefore imposes an undue burden).

Instead, the Act bans intact D&E and some non-intact D&Es, which the Government now terms "'partial-birth abortion' in the literal sense of the phrase." The Act bans these non-intact D&Es "regardless whether the ultimate lethal act is (1) the dismemberment of the fetus, (2) the puncturing of its skull and vacuuming out of its brain, or (3) some other act (besides completion of delivery)." Petr.'s Br. 47.

Unlike the Nebraska Attorney General in *Stenberg* who offered a construction that would have limited the Nebraska law to intact D&E procedures, therefore, the Government here is offering a modified and broader definition of intact D&E in an unapologetic attempt to bring D&Es within the Act's prohibitions. *Cf. Stenberg*, 530 U.S. at 940 (rejecting the

Attorney General's argument that the statute bans intact D&E procedures).

The impact of the Government's attempt to expand the range of conduct that might be prohibited from intact D&E to "partial-birth abortion in the literal sense" is significant. Any physician who seeks to remove the fetus "as intact as possible," as the D&E providers testified that they do, and then conducts a procedure that follows the elements in the Act, no matter what steps the physician takes to complete removal of the fetus, including dismemberment, would, under the Government's view, violate the Act. As numerous physicians in this case testified, it is always their intent to remove the fetus as intact as possible in order to take advantage of the safety benefits of fewer insertions of forceps. *See infra* at 43. The end result therefore is that, even though the Government suggests that the scienter requirements of the Act limit its scope, it is at the same time arguing that the Act permissibly bans a broad range of conduct.

C. The Government's "Specific Intent" Construction Would Still Allow Prosecutions of Physicians Who Perform D&E Abortions.

Even if the Act requires specific intent at the outset of the procedure, it precludes physicians from performing some D&E procedures, as the Government now admits, and therefore imposes an undue burden. *See* PA 508a, 521a. As the district court explained, physicians, "with pre-meditated and specific intent," desire to remove the fetus as intact as possible, *i.e.*, using the fewest number of instrument passes. PA 516a. Whether or not the physician is successful in removing the fetus intact, the dilation prior to the procedure and the physician's movement during the procedure are the same. PA 517a.

The district court therefore correctly concluded that the Act covers situations in which the physician has dual intent

at the beginning of the procedure, either to perform an intact D&E or non-intact D&E, "[b]ut he does not know which procedure he will perform until he has performed it." PA 516a. Therefore, "even accepting the government's 'specific intent' construction," if the physician "separates the living fetus into two or more pieces when the intact fetal body past the navel has been delivered outside the woman's body, he violates the law even though he has not delivered an intact fetus, but, on the contrary, has performed a standard D&E." PA 521a.[24]

All of the D&E providers who testified in this case stated that they attempt to remove the fetus as intact as possible.[25] The techniques they use are very similar, with some minor variations adapted to the particular patient they are treating or according to their own training and skills. The testimony also established that many of these physicians remove relatively intact fetuses in a notable percentage of their D&E procedures, while others obtain them in a relatively small percentage of their D&E procedures. *Supra* at 13. They set out to perform a D&E abortion in the safest manner possible, and in varying percentages of their procedures will succeed in removing the fetus in a manner that would violate the Act. Given that these physicians have the dual intent identified by the district court at the beginning of every procedure, the Act effectively prohibits their current D&E practice.

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[24] That the specific intent construction does not limit the Act is further proven by the Government's view that all of the scienter requirements in the Act, including its proposed "specific intent at the outset of the procedure" are satisfied when a physician desires "to remove the fetus as intact as possible." *See* Gov't C.A. Reply 27.

[25] Thus the Government's assertion that the Act would not cover procedures where a physician "unintentionally delivered a major portion of the fetus," Petr.'s Br. 47, even if correct, would not prevent application of the Act to any of the physicians testifying in this case.

D. The Government's "Specific Intent" Construction Is Unsupported by the Text and Contradicts Congressional Intent.

The Government asserts that the Act should be read to require "specific intent at the outset of the procedure," even though that element is not included within the Act's text.[26] While agreeing to adopt the Government's proposed construction, the district court noted that "there is a strong argument that the statute cannot be limited as [the Government] proposes," and identified several persuasive reasons why the construction might be rejected. *See* PA 526a-28a; *see also PPFA*, 435 F.3d at 1179-80 (rejecting specific intent construction), *aff'g* 320 F. Supp. 2d at 978.

First, the Government's proposed construction - that the physician must have "specific intent at the outset of the procedure" - should be rejected because it is unsupportable under the plain text and would require this Court to write in additional language Congress chose not to include. *See Salinas v. United States*, 522 U.S. 52, 59-60 (1997) (citations omitted); *see also Virginia v. Am. Booksellers Ass'ns, Inc.*, 484 U.S. 383, 397 (1988). Second, construing the Act to require specific intent is inappropriate where, as here, Congress has explicitly defined the conduct banned by the Act, and has explicitly designated different required *mens rea* elements.[27]

Finally, the Government's argument that the Court has "a much greater capacity" to interpret an act of Congress to avoid constitutional problems, Petr.'s Br. 46, does nothing to save the Act. This Court has not explicitly applied a different standard when determining whether a statute is readily

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[26] Although the Government summarily cites to the Act in its discussion of a limiting construction, it has consistently failed to articulate a textual basis for its proposed construction and before this Court makes no effort to explain it. *See* Petr.'s Br. 47.

[27] The canon of constitutional avoidance cannot overcome clear congressional intent. *Miller v. French*, 530 U.S. 327, 336 (2000).

amenable to a narrowing construction based on whether it is a state or federal law. *Compare Reno v. ACLU*, 521 U.S. at 884 (federal statute), *with Am. Booksellers*, 484 U.S. at 397 (Virginia statute), *and Stenberg*, 530 U.S. at 944-45 ("[W]e are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent.") (citation omitted).[28] And in *Stenberg*, this Court refused to adopt a narrowing construction or to certify the issue to the Nebraska Supreme Court because "the statute [was not] 'fairly susceptible' to a narrowing construction." *Stenberg*, 530 U.S. at 942, 945 (citations omitted).

The relevant inquiry is whether the Government's proposed construction of the Act meets the standards enunciated in cases interpreting federal statutes, namely, is the reading "plausible," or is the statute "readily susceptible" to the proposed interpretation? Here, it is not.

III. The Act Is Impermissibly Vague.

As noted, the district court in this case held that without the Government's proposed specific intent construction, "the Act is plainly void for vagueness." PA 528a. Even with the specific intent limiting construction, however, the Act is vague. Although the district court and the Government agreed that incorporating the specific intent requirement was appropriate, they then came to dramatically different conclusions as to the impact of the construction on the application of the Act.

The Ninth Circuit, which did not adopt the specific intent construction, concluded that "the language of the

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[28] The cases relied on by the Government are inapposite because they address the fact that federal courts are without jurisdiction to provide "authoritative constructions" of state statutes. *See Houston v. Hill*, 482 U.S. 451, 474 (1987) (Powell, J., dissenting) ("The ordinance is not a federal law, and we do not have the power 'authoritatively to construe' it.") (citations omitted); *Gooding v. Wilson*, 405 U.S. 518, 520 (1972) (same); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971) (same).

statute, taken as a whole, is not sufficiently clear regarding what it permits and prohibits to guide the conduct of those affected by its terms, specifically medical practitioners." 435 F.3d at 1176, 1181-82; *see also id.* at 1183 ("[Doctors] cannot be reasonably certain that their conduct is beyond the reach of the Act's criminal provisions; nor can they be reasonably assured that the Act will not be arbitrarily enforced.").

Nor has the Government been consistent in describing what conduct is encompassed by the Act. Before the district court in *PPFA*, the Government described the conduct banned by the Act as limited to procedures involving reduction or removal of the fetal head "after the rest of the body has been delivered and while the head is lodged in the woman's cervix." Def.'s Post-Tr. Prop. Find. of Fact and Conc. of Law at 51, *PPFA*, 320 F. Supp. 2d 957 (N.D. Cal 2004) (No. C 03-4872 PJH); *see PPFA*, 320 F. Supp. 2d at 969 (arguing that the Act should be interpreted so as not to apply to "D&Es by disarticulation"); Def's Tr. Br. 6 ("[T]he procedure targeted by the Act" includes "steps . . . taken to deliver the fetus as intact as possible at least to the head, which is then reduced in size"). Before this Court, however, the Government asserts that the Act covers procedures in addition to those involving reduction of the fetal skull, including procedures involving dismemberment. *See* Petr.'s Br. 47 (arguing that "overt act" can include "the dismemberment of the fetus").

The Government's ultimate assertion that, even with the specific intent element the Act requires nothing more than that the physician "intend to remove the fetus as intact as possible," combined with virtually any other conduct, including dismemberment, further demonstrates that the requirements of the Act are so malleable that they lend themselves to seemingly endless interpretations. These circumstances combine to show that Congress has violated "'the requirement that a legislature establish minimal

guidelines to govern law enforcement.'"[29] *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

IV. The Act Must Be Enjoined in Its Entirety.

Reasoned consideration of the remedial principles applicable when a statute is found to be unconstitutional compels the conclusion that Plaintiffs are entitled to an injunction enjoining the Act in its entirety.

A. Congress Would Not Have Enacted the Ban with a Health Exception.

This Court recently emphasized "[t]hree interrelated principles" that must guide courts when considering the remedy for a statute that unconstitutionally impedes access to abortion. *Ayotte*, 126 S. Ct. at 967. First, the court should try to invalidate no more of a statute "than is necessary." *Id.* Second, "mindful that [the courts'] constitutional mandate and institutional competence are limited," courts must "restrain [themselves] from 'rewrit[ing] a state law . . .' even as [they] strive to salvage it." *Id.* at 968 (quoting *Am. Booksellers*, 484 U.S. at 397) (third alteration in the original). Finally, "a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Id.* (quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part)). Thus, after finding an application or portion of a statute

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[29] The Government's statement that "[i]t is hard to imagine how the proscribed conduct could be defined any more precisely, at least without dramatically narrowing the scope of the statute," is telling. Petr.'s Br. 49. Congressional desire to enact a broad statute does not change the applicable vagueness analysis. "The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

unconstitutional, the courts must ask: "Would the legislature have preferred what is left of its statute to no statute at all?" *Id.* Here, those factors lead inexorably to the conclusion that the Act must be invalidated in its entirety.

It is beyond peradventure that "[e]nacting a 'partial-birth abortion' ban *with no health exception* was . . . one of Congress's primary motivations in passing the Act." *PPFA*, 435 F.3d at 1186-87. There are numerous signs of that intent, both on the face of the Act and in its legislative history. For example, the Act's findings unambiguously reflect Congress's strong conviction to avoid inclusion of a health exception. Five out of fourteen findings insist that procedures banned by the Act are not medically necessary or that no health exception is required. *See* Act §§ 2(1), (2), (5), (13), (14(o)), Petr.'s Br. App. 1a-2a, 5a-6a, 10a. Even while acknowledging that this Court in *Stenberg* struck down the Nebraska ban because it omitted to provide a health exception, the findings argue for a similar exclusion from the Act. *See id.* §§ 2(8)-2(13) Petr.'s Br. App. 3a-6a. And, to eliminate any uncertainty that its proponents deliberately rejected the inclusion of a health exception, the findings demand that courts unquestioningly defer to the congressional findings that no such exception is required.

In addition to the evidence spread across the face of the Act, there are abundant signs of congressional intent to avoid inclusion of a health exception in the record documenting the Act's passage. *See PPFA*, 435 F.3d at 1186 n.28 (listing numerous opportunities rejected by the 108th Congress to include a health exception in the Act).

In passing the Act, Congress was resolute in its intent to flout the judgment of the *Stenberg* Court by enacting a ban that purposely omitted a health exception. Fashioning an injunction that injects into the statute that which Congress so clearly eschewed would unquestionably "circumvent the intent of the legislature." *Ayotte*, 126 S. Ct. at 968; *see also PPFA*, 435 F.3d at 1187 ("When Congress deliberately makes

a decision to omit a particular provision from a statute—a decision that it is aware may well result in the statute's wholesale invalidation . . . we would not be faithful to its legislative intent were we to devise a remedy that in effect inserts the provision into the statute contrary to its wishes.").[30]

B. The Act's Unconstitutional Breadth and Vagueness Cannot Be Cured by a Limited Injunction.

First, we have shown, *supra* at 37-45, the Act is fatally overbroad and places in jeopardy of criminal prosecution those who perform non-intact D&E abortions, the most widely employed form of second trimester abortion. That constitutional defect can be remedied only by invalidation of the Act *in toto* because the Act poses a substantial obstacle to a woman's right to choose in a large fraction of cases. *See id.*

The language Congress used in the Act so broadly defines "partial-birth abortion" that all physicians who perform D&E abortions "must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision." *Stenberg*, 530

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[30] In suggesting that "a statute that prohibits a procedure that is safer only in specific circumstances presumably could be enjoined only as to those specific applications," Petr.'s Br. 16 n.1, the Government illustrates the very dangers this Court warned of in *Ayotte*. *See* 126 S. Ct. at 968 ("[M]aking distinctions . . . where line-drawing is inherently complex, may call for a 'far more serious invasion of the legislative domain' than we ought to undertake.") (quoting *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995)); *see also Randall*, 126 S. Ct. at 2500 (declining to enter limited injunction where "[t]o sever provisions to avoid constitutional objection[s] . . . would require us to write words in the statute . . ., or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found"). Deciding which procedures warrant special treatment and which do not is "inherently complex" and would invade the legislative domain. *See Ayotte*, 126 S. Ct. at 968. Likewise, crafting a complete list of "specific applications" that would protect women would be impossible, as there are invariably situations that are unforeseen that arise in the practice of medicine.

U.S. at 945-46. When it confronted a similarly overbroad statute in *Stenberg*, the Court enjoined Nebraska's law in its entirety. *Stenberg*'s invalidation of the Nebraska law because of overbreadth was a principled application of the remedial rule announced in *Casey*. 505 U.S. at 895 (requiring facial invalidation when a statute presents a "substantial obstacle" to the exercise of a woman's right to choose abortion in a "large fraction" of cases).

In this case, the Act's overbreadth will likewise chill physicians' usage of the most common method of second trimester abortion, preventing a large fraction of the women in need of a second trimester abortion from exercising their right to obtain one. For that reason, the enjoining of the Act in its entirety is necessary and proper.

Second, because the statute is vague and would, as shown above, *supra* at 45-47, reach "a substantial amount of constitutionally protected conduct," *Kolender*, 461 U.S. at 358 n.8, 361-62 (quotations omitted); *see also Morales*, 527 U.S. at 51, 64; *Aptheker v. Sec'y of State*, 378 U.S. 500, 514 (1964), the Court must enjoin it in its entirety.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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